

**State of New Hampshire
Department of Environmental Services
Waste Management Council**

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In re: Decision on Proposed Revocation of
Solid Waste Permit of Regenesis Corp.

Waste Management Council Docket No. 05-09-WMC (Consolidated)
DES Office of the Commissioner Docket No. 04-010
Solid Waste Permit No. DES-SW-SP-002

**REACH'S MOTION FOR CLARIFICATION
AND/OR RECONSIDERATION**

NOW COMES Resident's Environmental Action Committee for Health ("REACH"), through its undersigned counsel, and hereby requests that the Waste Management Council (the "Council") clarify and/or reconsider, if necessary, a portion of its Decision and Order in the above-captioned matter due to an error of law. In support of this Motion, REACH states as follows:

Procedural Basis for Motion

1. This Motion is made pursuant to Env-WMC 205.16.
2. The basis for this Motion is that REACH respectfully submits that the Council's Decision and Order contains a statement that is not clear, and potentially represents an interpretation of a statutory provision constituting an error of law. The basis for REACH's request for clarification and to reconsider any such finding and conclusion is set forth herein.

Portion of Decision and Order at Issue

3. The finding and conclusion at issue is set forth on page 5 of the Decision and Order, specifically that "...the Council finds that the certification language for 'existing' permittee per RSA 149-M:9 is limited to existing officers, directors or partners not past officers, directors or partners."

Statute at Issue

4. The provision at issue is set forth in RSA 149-M:9,IX(c), which holds that the Department may deny a permit application for a corporation or business entity “if any of its officers, directors, partners, key employees or persons or business entities holding 10 percent or more of its equity or debt liability has been convicted of, or pled guilty or no contest to, a felony in any state or federal court during the 5 years before the date of the permit application.” See also Env-Wm 303.14.

Basis for Clarification Request to Eliminate Possible Error of Law, and in the Alternative, to Reconsider

5. The interpretation of this statutory provision as possibly set forth in the Council’s Decision and Order is not consistent with the remainder of the Decision and Order or a reading of the statute’s plain meaning, nor is it in keeping with the purpose of the statute.
6. The interpretation and application possibly adopted by the Council would also allow, and indeed encourage and reward, corporate draftsmanship over public health, safety and welfare, as well as veracity and candor.
7. The certification requirement at issue is “intended to provide the department with the information necessary to determine, as provided in RSA 149-M:9,III and IX, whether an applicant, owner, facility operator, or any of the applicant’s officers, directors, partners, key employees, or major debt or equity holders, has been convicted of or pled guilty or no contest to a felony within 5 years of the date of the permit application, or has failed to demonstrate sufficient reliability, expertise, integrity and competence to operate a solid waste facility.” Env-Wm 316.01. The Council’s possible interpretation of this certification requirement is inconsistent with the statutory language, and is also contrary to the purpose of the statute and the solid waste rules.
8. For instance, under the Council’s possible interpretation of the law, a company holding a solid waste permit could *lawfully* remove a convicted felon as an officer, director, or other corporate principal, instead transferring the convicted felon to a parent, affiliated or holding company, still participating in that manner in the management, operations and finances of the solid waste facility, and all while remaining in compliance with the law. NHDES would be entirely unaware of the involvement of a convicted felon in the solid waste facility, both historically and into the future, and the public health, safety and welfare would be entirely undermined and unprotected.
9. Here, Respondent removed the convicted felon as an officer, director and shareholder, on paper (so as to ostensibly be “free” from his or her involvement at the time of certification), and shifted its solid waste permit to a new entity

established solely to hold the permit and for no other purpose (also so as to ostensibly be “free” from the involvement of a convicted felon going forward). Respondent then established the convicted felon as an owner of a third entity, which holds the facility’s real estate and other property, and finances the facility’s operations and activities, in addition to benefiting from the facility’s proceeds. On paper Respondent redrafted its corporate organizational chart so as to avoid disclosure to NHDES regarding the involvement of a convicted felon. In reality, Respondent changed nothing. This is precisely what NHDES and the Office of the Attorney General concluded, and the Hearing Officer held, was a violation of the law.

10. Such an interpretation of the law would allow, and indeed reward, such actions, and would create a “playbook” for all solid waste permittees wishing to avoid disclosing information to NHDES (and therefore the Office of the Attorney General, this Council, etc) as required by the solid waste statute or rules. It would render the very specific and essential suitability, investigation and disclosure requirements of RSA 149-M, meaningless. It would reduce this very detailed comprehensive statutory scheme to a one-day “snapshot” of the permittee on the one day on which the certification is made, without any requirement to disclose individuals or events, otherwise requiring disclosure under oath, if they happened previously (such as during the prior 5 years, as the statute plainly requires) or subsequently.
11. The interpretation of this statutory provision possibly set forth in the Council’s Decision and Order would render the entirety of RSA 149-M, and its very specific and essential suitability, investigation and disclosure requirements, entirely ineffective and a farce. Respectfully, REACH submits that such an interpretation or result is not consistent with the plain meaning or purpose of the statutory provision at issue.
12. The Amended Notice of Proposed License Action, the Decision of the Hearing Officer, and the entirety of the record below in this matter, all accurately reflect that the Respondent failed to provide sufficient disclosure and accurate certification due to the recent felony conviction of Anthony Dinapoli, an officer and director of Respondent. Despite the fact that Respondent realized that disclosure of this conviction of an officer and director would be required under the law, that the department would want to know about this development, and that such disclosure would slow down or otherwise complicate the pending permit modification, Respondent attempted to *avoid* disclosure to the department. In order to avoid disclosure by certification, Respondent had Mr. Dinapoli turn in his shares of Bio Energy Corporation and resign as an officer and director, even though this entity had purportedly sold all of its assets to Bio Energy LLC, had wound up, was not to play a future roll in the Bio Energy Facility, and its shares were effectively worthless. These steps were taken solely to remove a convicted felon from the paper trail both retroactively and prospectively, so as to avoid

disclosure, while still allowing this same convicted felon to remain financially and managerially involved in the solid waste facility.

13. Despite the foregoing intricate and carefully choreographed actions by Respondent, designed to avoid disclosure of the Dinapoli conviction by certification, Mr. Dinapoli continued to remain involved in the Bio Energy Facility (even as of the time of the hearing below), as an owner and member of Bio Energy LLC, which owns the facility (leasing it to Regenesys) and funds all maintenance, improvements, construction and operations. Mr. Dinapoli also continued to realize all profits and proceeds from the facility, also through his status as owner and member of Bio Energy LLC.
14. Despite all of these actions, Respondent never disclosed, by certification or otherwise, the conviction of Mr. Dinapoli, resulting in the department and Office of the Attorney General initiating the action presently on appeal to the Council.
15. The foregoing represents a violation of the disclosure and certification requirements of RSA 149-M:9, among other things. Any interpretation of this statutory provision that holds otherwise, and allows such actions, represents an error of law.
16. REACH hereby incorporates by reference the record below (including its Requests for Findings of Fact and Rulings of Law and the Hearing Officer's Decision) as well as its Appeal Hearing Memorandum, as if set forth fully herein.

WHEREFORE, REACH respectfully requests that the Waste Management Council:

- A. Clarify and/or otherwise reconsider the portion of its Decision and Order regarding the requirements of RSA 149-M:9;
- B. Reaffirm the remainder of its Decision and Order consistent with the Decision of the Hearing Officer and/or otherwise denying Respondent's Appeal; and
- C. Grant such other and further relief as justice requires.

Respectfully submitted,

RESIDENT'S ENVIRONMENTAL
ACTION COMMITTEE FOR
HEALTH,

Through its counsel,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Motion has been filed with the Appeals Clerk of the Waste Management Council (original and 20 copies) by hand, and delivered by U.S. Mail to the Office of the Commissioner of DES and Office of the Director of the Waste Management Division of DES (pursuant to Env-WMC 204.02(d)), Edward A. Haffer, Esq. (counsel to Respondent permittee), Jennifer J. Patterson, Esq. (Senior Assistant Attorney General, Attorney General's Office, Environmental Protection Bureau, counsel to DES), Barry Needleman, Esq. (counsel to the Town of Hopkinton), and Jeffrey L. Roelofs, Esq. (counsel to Citizens for a Future New Hampshire).

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John E. Friberg, Jr., Esq.